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No. 77-886

In the Supreme Court of the United States

OCTOBER TERM, 1977

MICHAEL J. MARTORELLA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The court of appeals affirmed by judgment order (Pet. App. B).

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1977, and a petition for rehearing was denied on November 17, 1977. The petition for a writ of certiorari was filed on December 16, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government's application for an intercept order sufficiently listed the facts concerning "all previous applications * * * involving any of the same persons, facilities or places specified in the application * * *" in compliance with 18 U.S.C. 2518 (1)(e).

2. Whether "gross revenue of $2,000 in any single day," as used in 18 U.S.C. 1955, refers to the amount of money wagered with an illegal gambling business, not the money won by the gambling business.

3. Whether the evidence was sufficient to convict petitioner Nugara.

STATEMENT

Both Martorellas pleaded guilty in the United States District Court for the Western District of Pennsylvania to charges of operating an illegal gambling business and conspiracy to do so in violation of 18 U.S.C. 1955 and 371.[1] Following a jury trial petitioners Nugara and Esposto were convicted on both counts.[2] Michael Martorella and Esposto were sentenced to three years' imprisonment and fined $20,000. Nugara and Anthony Martorella were sentenced to two years' imprisonment and fined $10,000. The court of appeals affirmed (Pet. App. B).

[1] The Martorellas entered a conditional guilty plea preserving their right to challenge the legality of the wire interception on appeal. Co-defendants Anthony Wincko and Dominic Di Silvio also pleaded guilty to the charges.

[2] The indictment was dismissed against co-defendant Norma Jean Lame during the Esposto-Nugara trial.

The evidence at the Esposto-Nugara trial showed that in April 1973 petitioners and several others operated an illegal gambling business headquartered at the Braddock News Agency, a business owned jointly by Esposto and Michael Martorella in Braddock, Pennsylvania (Tr. 66–68). A court-ordered electronic surveillance of six telephone lines over some fifteen days produced most of the evidence. Five of the telephones were situated in the Braddock News Agency and the sixth in Michael Martorella's private residence (Tr. 13–14, 29, 39). Gambling paraphernalia, cash and other evidence of an illegal gambling business were also seized during searches of the Esposto and Martorella residences, the Braddock News Agency, and the Comet News Agency, a business owned and operated by Nugara across the street from Braddock News (Tr. 33–34, 525–583).

ARGUMENT

1. In 1970 the government applied for a court order authorizing electronic surveillance of telephones owned by William Cihal. The application did not name any of the petitioners as persons whom the government expected to intercept, but both Martorellas were overheard during the surveillance of Cihal's phone. In a subsequent criminal proceeding instituted against Cihal, the Martorellas and nine others, the United States District Court for the Western District of Pennsylvania suppressed those intercepted conversations. *United States* v. *Cihal*, 336 F. Supp. 261.

a. Petitioners contend that since the government's application for a wire interception in the present case

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did not refer to the previous *Cihal* interception, it violated the requirements of 18 U.S.C. 2518(1)(e).[3] The courts of appeals, however, have unanimously interpreted Section 2518(1)(e) to require disclosure of previous "applications" involving the same parties but not all previous "interceptions" of those parties. *United States* v. *Easterling*, 554 F. 2d 195, 196 (C.A. 5); *United States* v. *Sklaroff*, 552 F. 2d 1156 (C.A. 5), certiorari denied *sub nom. Goldstein* v. *United States*, No. 77-169, January 9, 1978; *United States* v. *Florea*, 541 F. 2d 568, 576 (C.A. 6), certiorari denied, 430 U.S. 945, rehearing denied, 431 U.S. 925.

In the very nature of things, most approved applications generate a multitude of conversations wholly or partially intercepted. To require the listing of all previous interceptions would hobble the government with an unmanageable burden which Congress did not wish to impose. Accordingly, Congress chose the narrower word "applications," rather than broader term "interceptions," when drafting Section 2518(1)(e). We submit the courts of appeals have correctly construed this statutory provision.[4]

[3] Only Michael Martorella has standing to raise this issue, since he was the sole person overheard during the *Cihal* interception who was also a target of this interception. Anthony Martorella, although overheard during the *Cihal* interception, was not named in or a target of this interception. Hence, he could not expect the government to enumerate his previous interceptions in this application.

[4] Petitioner's contention (Pet. 8–9) that *United States* v. *Bellosi*, 501 F. 2d 833 (C.A.D.C.), says that "applications" is a broader term than "interceptions" is wrong. *Bellosi* states just the contrary.

b. In any event, assuming *arguendo* a violation of the statute, suppression is not compelled. Suppression would be mandated here only if "the communication was unlawfully intercepted." 18 U.S.C. 2518(10)(a)(i).[5] Here the district court found that the present application was not the "fruit" of the *Cihal* interception but was based on facts gathered from other sources, and petitioners do not challenge that finding. Accordingly, the *Cihal* interception did not play a "'substantive role' with respect to [the] judicial authorization of [the] intercept orders." *United States* v. *Donovan*, 429 U.S. 413, 435; *United States* v. *Chavez*, 416 U.S. 562, 574–575. Furthermore, the fail-

501 F. 2d at 839 n. 13. *Bellosi*, in holding that the government must list all prior "applications," notes that Congress may have required disclosure of all previous *applications*, instead of all prior *interceptions*, to avoid unduly burdening the Government and to avoid an ambiguity which inheres in the latter word and which is not clearly resolved by its use elsewhere in the statute" (emphasis by the court). *Ibid.*

The *Bellosi* court also notes that if petitioner's interpretation prevailed, the government would have a "substantial burden of informing the judge from whom an authorization was sought of each individual conversation which had been previously intercepted using the same facilities or places or involving the same persons * * *." *Ibid.*

[5] 18 U.S.C. 2518(10)(a) triggers suppression where:

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order or authorization or approval."

The latter two circumstances plainly do not apply here. See *United States* v. *Donovan*, 429 U.S. 413, 432.

ure to list the earlier intereception was irrelevant to the criteria[6] which govern the approval of an intercept application. See *Chavez, supra; Donovan, supra,* 429 U.S. at 435; *United States* v. *Abramson,* 553 F. 2d 1164, 1170 (C.A. 8), certiorari denied, No. 76–1672, June 27, 1977.[7]

2. 18 U.S.C. 1955(b)(1)(iii) defines an illegal gambling business as one which "has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day." Nugara and Esposto contend that "gross revenue" should be measured by "* * * the amount of monies won by the gambling business and not by the amount of monies wagered with the business" (Pet. 17), even though they concede that it

[6] 18 U.S.C. 2518(3) (a)–(d) provides "* * * that the issuing judge may approve an intercept application if he determines that normal investigative techniques have failed or are unlikely to succeed and there is probable cause to believe that: (i) an individual is engaged in criminal activity; (ii) particular communications concerning the offense will be obtained through interception; and (iii) the target facilities are being used in connection with the specified criminal activity." *Donovan, supra,* 429 U.S. at 435.

[7] The alleged conflict (Pet. 8–9) between *Abramson, supra,* and *Bellosi, supra,* does not exist. The two cases differ factually. In *Abramson,* the government voluntarily disclosed the previous interception while failing to disclose that interception's suppression. In *Bellosi,* the government deliberately concealed the previous application even though it named the defendant. Hence, in *Abramson,* there was at least partial compliance with the statute, and suppression was not required; in *Bellosi* there was no compliance, and accordingly the court chose to suppress the intercepted conversations. Here, the government in good faith complied with the language of the statute, and suppression therefore is not warranted.

should not be measured by "net profit" (Pet. 15). However, the courts have consistently defined "gross revenue" as the total amount wagered in one day. *United States* v. *Sacco,* 491 F. 2d 995, 1001 (C.A. 9) (*en banc*); *United States* v. *Ceraso,* 467 F. 2d 653, 656–657 (C.A. 3); *United States* v. *Schullo,* 363 F. Supp. 246, 248–249 (D. Minn.), affirmed *sub nom. United States* v. *Thomas,* 508 F. 2d 1200, 1203 (C.A. 8), certiorari denied, 421 U.S. 947. As the *Ceraso* court noted, the government's task would be enormously complicated if it had to determine not only the amount of daily wagers, but also which of those wagers were won by the bookmaker rather than the bettor. 467 F. 2d at 657. The statute is aimed at large gambling enterprises, the size of which is more accurately measured by the volume of wagers and should not depend on the "luck of the odds" for any single day. *Sacco, supra,* 491 F. 2d at 1001.

The legislative history supports our interpretation of the Act. During the House and Senate debates, several Congressmen referred to "gross revenue" as the amount wagered, thereby adopting the definition given that term in the Report of the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (February 1967).[8]

3. Petitioner Nugara contends that the evidence did not prove that he participated in the Martorella-

[8] See, *e.g.*, remarks of Senator Hruska, 115 Cong. Rec. 10736 (1969); Congressman Poff, 116 Cong. Rec. 35295 (1970); Senator Allott, 116 Cong. Rec. 603–604 (1970); Senator Byrd, 116 Cong. Rec. 606 (1970); Senator McClellan, 115 Cong. Rec. 5873 (1969), 116 Cong. Rec. 590 (1970).

Esposto gambling business, but rather showed that he competed against it. However, there was a taped telephone call from Nugara to Esposto which, the jury could reasonably have concluded, showed his cooperation and complicity (Tr. 338–340). The conversation refers frequently to "we"; for example, "we might get a bad break once in a while," "why don't we go along like we talked about it the other day until the end of the week," and "why don't you leave it the way we agreed the other day, and see what happen [sic] by the end of the week, then we'll sit down Sunday and talk it over." At the end of the conversation Esposto ordered Nugara to send "Jim" over. Whether the conversation showed cooperation or competition was a question of fact to be determined by the jury. Viewed in a light most favorable to the government, the jury could find that it showed a disagreement between two members of a single conspiracy with conflicting ideas on the best method of achieving financial success for their gambling business.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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